

1 **THE HONORABLE LONNY R. SUKO**

FILED IN THE  
U.S. DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

OCT 02 2009

JAMES R. LARSEN, CLERK  
DEPUTY  
RICHLAND, WASHINGTON

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3  
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6  
7  
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9  
10 IN THE UNITED STATES DISTRICT COURT FOR  
THE EASTERN DISTRICT OF WASHINGTON AT RICHLAND

11 JAMES S. GORDON, JR., Franklin  
12 County, Washington, Plaintiff,

NO. CV-08-5074-LRS

13 v.

DECLARATION IN SUPPORT OF  
PLAINTIFF'S CROSS MOTION FOR  
PARTIAL SUMMARY JUDGMENT

14 COMMONWEALTH  
15 MARKETING GROUP, INC.,  
16 AND JOHN DOES 1-10,

17 Defendants,

18 v.

19 IMG ASSOCIATES, LLC, a  
20 Georgia limited liability company,

21 Third Party Defendant

22  
23 TO: CLERK OF THE COURT

24 AND TO: COUNSEL FOR DEFENDANTS

25  
26  
27  
28 DECL SUPP X MTN 4 PSJ

Page 1 of 5

**DECLARATION**

1. I, James S. Gordon, Jr., am over the age of 18 and competent to testify.
2. I am the plaintiff in the above-captioned complaint.
3. Mr. Fonzo's declaration [Exhibit D] is attached as an exhibit to defendant's motion for summary judgment.
4. The date in Mr. Fonzo's Ex. D represents one of the notification dates – according to the language of the Can-spam statute - after which defendant is prohibited from contacting recipient once the 10-day “waiting” period expires.
5. Attached as **EXHIBIT A** is a letter from defendant's CEO to IMG demanding the cessation of emails to plaintiff.
6. I wrote the March 27, 2006 certified letter that was sent to defendant –even though Bonnie Gordon's signature is on the document. **EXHIBIT B**
7. Attached as **EXHIBIT C** is the discovery supplied by defendant [opt-out records] in the first Gordon v. Commonwealth lawsuit from December 2003.
8. Attached as **EXHIBIT D** are two exemplars of emails which have the same domain in the “from field” and the “to field”.
9. This “sleight of hand” by spammers gives the appearance that defendant's commercial email is being received by the sender.

1 10. In each case, defendant uses plaintiff and/or plaintiff's customers domains  
2 without permission.

3  
4 11. Attached as **EXHIBIT E** are domain ownership or Whois records of plaintiff  
5 and two of plaintiff's customers.

6  
7 12. James S. Gordon III did not give defendant permission to send him  
8 commercial email ads at his domains.

9  
10 13. James S. Gordon III did not give defendant permission to use his domain  
11 names in its commercial email ads.

12  
13 14. Bonnie F. Gordon did not give defendant permission to send her commercial  
14 email ads.

15  
16 15. Bonnie F. Gordon did not give defendants permission to use her domain  
17 name in its commercial email ads.

18  
19 16. I did not give defendant permission to use my domains or to send  
20 commercial email to my domains, i.e. gordonworks.com,  
21 omniinnovations.com, greatnorthwest-alpha.org, or rcw19190020.com

22  
23 17. I was the plaintiff in Gordon vs. Virtumundo, which was decided in favor of  
24 defendant, Virtumundo on or about May 15, 2007.

25  
26 18. On or about November 14, 2007, Virtumundo et al executed a writ – seizing  
27 plaintiff's personal and business property, case # 07-2-50898-1 in Franklin  
28 County Superior Court.

1 19. The business property that was seized included business computers and back-  
2 up hard drive containing the records and communications of plaintiff's  
3 customers.  
4

5 20. Plaintiff filed a preservation of evidence document on the record in the  
6 second Gordon vs. Virtumundo lawsuit – demanding that Virtumundo et al  
7 preserve the data seized under writ. **EXHIBIT F**  
8

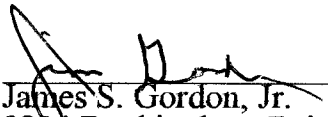
9 21. Virtumundo subsequently destroyed the hard drives containing evidence in at  
10 least seven on-going federal lawsuits. **EXHIBIT G**  
11

12 22. Virtumundo is a former (and perhaps current) business partner of  
13 defendant's exclusive marketing agent, Impulse Marketing Group – the third  
14 party defendant, above. **EXHIBIT H**  
15

16 23. Commonwealth Marketing Group, Inc. is a beneficiary of this destruction of  
17 evidence as offending emails and the analyses of same were destroyed by  
18 Virtumundo.  
19

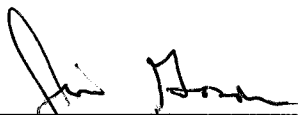
20  
21 I declare under penalty of perjury under the laws of the United States that the  
22 foregoing is true and correct to the best of my knowledge and belief.

23 Dated this 1<sup>st</sup> day of October, 2009.

24  
25   
26 James S. Gordon, Jr.  
27 9804 Buckingham Drive  
Pasco, WA 99301  
509-210-1069  
28

**CERTIFICATE OF SERVICE**

I, hereby, certify that on October 1, 2009, I filed this document with the Court and mailed a copy to counsel for Defendant and third party defendant.

  
James S. Gordon, Jr.



One Millennium Drive  
Uniontown, PA 15401  
Phone: (724) 437-3707

EXHIBIT A

February 9, 2004

Jeff Goldstein

Facsimile: (678) 805-2101

Impulse Marketing Group, Inc.

Five Concourse Parkway, Suite 950

Atlanta, GA 30328

Re: James S. Gordon, Jr. v. Commonwealth Marketing Group, Inc.

Dear Jeff:

Commonwealth Marketing Group, Inc. (CMG) hereby gives notice to Impulse Marketing Group, Inc. (IMG) to immediately cause IMG affiliated marketers, offerclicks and freebiegazette, to cease representing, in any and all manner whatsoever, IMG on behalf of CMG, unless and until IMG provides CMG with assurance that it has caused all of its affiliated marketers, including the two mentioned above, to cease and desist from sending messages, to the gordonworks.com e-mail domain.

CMG finds it necessary to take this drastic action as, despite repeated telephone conversations with IMG officers and staff of the need to act immediately on this extremely urgent matter, we learned today that the gordonworks.com domain continues to receive messages from IMG affiliated marketers. Specifically, on January 7, I wrote to you, attached a copy of an Order of Court of Benton County, Washington, against me, personally, CMG and IMG, enjoining the sending of e-mail messages to James Gordon. On January 9, John Fonzo, CMG Vice President and General Counsel, wrote to IMG's Phil Huston, requesting assurances concerning IMG CAN SPAM Act and state anti-Spam law compliance. (Gordon's lawsuits against CMG was filed pursuant to the Washington anti-Spam law). On February 2, Mr. Fonzo again wrote to Phil Huston, informing IMG in writing of our previous oral notification of the Gordon vs. CMG litigation, and raising indemnification issues under the CMG-IMG Website Development and Marketing Services Agreement.

It is my understanding that IMG's lawyers have responded in writing to the January 9 letter concerning SPAM law compliance, providing assurances of IMG compliance. Further, on multiple occasions, CMG has forwarded to IMG several e-mail messages as provided by James Gordon to me, for research and evaluation as to, among other things, origin of the messages, any evidence of Gordon opt-ins, as well as evidence of cessation of messages, to the extent they originated from an IMG affiliated marketer. My staff

CMG 000052

advises that they have had continuous dialogue with IMG technical staff as to these messages, together with certain assurances that proper safeguards were put in place to make certain that additional messages are not sent to Mr. Gordon.

What is equally troubling to me is that IMG was first notified of Gordon's alleged receipt of SPAM in September of 2003, immediately upon CMG's receipt of notice from Gordon of the allegations. Certainly, IMG has had sufficient time to address this serious situation. Thus, you can imagine my confusion, anger and embarrassment when I received from James Gordon on February 7, yet two additional e-mail messages that appeared to have originated from IMG affiliated marketers.

Jeff, it is absolutely imperative that this situation be addressed immediately. Given the long and productive business relationship that CMG and IMG has enjoyed, you must see this demand for IMG affiliated marketers who send messages to gordonworks.com, including the two mentioned above, to cease and desist representing IMG on CMG products as a final effort to get IMG's attention to do what is legally required and commercially responsible.

Please call me immediately upon receipt. At that time, we can direct to the person at IMG who will give this their undivided and immediate attention, the most recent e-mail messages received from James Gordon.

Sincerely,



Robert E. Kane  
President & CEO

CMG 000053

EXHIBIT B

**BONNIE F. GORDON**

9804 Buckingham Drive

Pasco, WA 99301

Telephone (509) 210-1069

**TO:** John Fonzo/Legal Dept.

**FROM:** Bonnie F. Gordon

**DATE:** March 27, 2006

**SUBJECT:** Impulse Creates CMG Liability - Case No. CV-04-5125-FVS

The subject lawsuit was filed in the Federal Court - Eastern District of Washington State. I am one of the named third-party defendants. My causes of action against Impulse and its management include violations of federal and state civil and criminal statutes, i.e. Can-Spam, RCW 19.190, RCW 9.35, RCW 19.170, RCW 10.14, RCW 19.86, etc.

I am in possession of discovery materials, which CMG produced for the Gordon v. Commonwealth Marketing Group, Inc. lawsuit. A cursory review of these materials shows that both CMG and Impulse were well aware of the requirements of Washington's laws and the Can-Spam statute. These documents outline a timeline and a series of communications that CMG had with Impulse's Goldstein, Huston, Adamson and others in regards to stopping (illegal) spam.

On January 7, 2004, Robert Kane, then CEO of Commonwealth Marketing Group, Inc., wrote Impulse's Jeff Goldstein - saying, ***"it is imperative that Impulse and any Impulse affiliate marketers take every available step to assure that no message of any kind be transmitted to the network domain:***

***"gordonworks.com"***. By the way, Impulse sent in excess of 1,000 emails to "gordonworks.com" after that letter.

During the past year, Impulse sent over 7,000 emails to me, family, friends, and businesses who host their own personal domains (not gordonworks.com) on our server. Potential civil damages under the various statutes above may exceed ten million dollars prior to any trebling of damages permitted by certain statutes.

If I understand CMG's communications with Impulse in the proper light - CMG is genuinely interested in "reigning in" Impulse's apparent lack of discipline in terms of the requirements of compliance with state and federal laws. If this understanding is true, you will come to my (our) aid to ensure that no unwanted communications are sent to our server, again.

Thank you, in advance, for your assistance.

**Impulse Creates CMG Liability - Case No. CV-04-5125-FVS**

The compact disk which is enclosed with this letter contains email from Impulse and its agents, which have been sent on behalf of CMG. The file which begins with "00" is the file which contains all but the most recent IMG spam [there may be some duplicates]. The file which begins with "0" is incomplete, but represents a low end estimate of the number of emails sent by Impulse. The Eudora application on the compact disk is a "free" version of the software that I use for email – you will need it to access the files – which must then be placed in the directory of the application.

It is our sincere desire to have all domains referenced on the compact disk immediately blocked from receiving all of your advertisements via email. All of these domains are referenced (WHOIS) as domains belonging to Washington State residents.

**Sincerely,**

**Bonnie F. Gordon**

## CMG Opt Out and Offers Maintenance Page

Email: ☐ Telephone☒ EmailOpt Out Level to Add: 

Opt Outs for and Offers Sent to Email: emily@gordonworks.com

Initial Opt Out	Last Opt Out	Opt Out Item Type	Opt Out Item Description
05/03/2004 15:32:59		Opt Out of Everything	Everything

## CMG Opt Out and Offers Maintenance Page

Email: faye@gordonworks.com

☐ Telephone

Query

☒ Email

Opt Out Level to Add: Opt Out of Everything

Add Opt Out

Opt Outs for and Offers Sent to Email: faye@gordonworks.com

Initial Opt Out	Last Opt Out	Opt Out Item Type	Opt Out Item Description
01/06/2004 11:45:44		Opt Out of Everything	Everything

## CMG Opt Out and Offers Maintenance Page

Email: james@gordonworks.com

☐ Telephone☒ Email

Query

Opt Out Level to Add: Opt Out of Everything

Add Opt Out

Opt Outs for and Offers Sent to Email: james@gordonworks.com

Initial Opt Out	Last Opt Out	Opt Out Item Type	Opt Out Item Description
01/13/2004 17:39:21		Opt Out of Everything	Everything

## CMG Opt Out and Offers Maintenance Page

Email: ☐ Telephone☒ EmailOpt Out Level to Add: 

Opt Outs for and Offers Sent to Email: jamila@gordonworks.com

Initial Opt Out	Last Opt Out	Opt Out Item Type	Opt Out Item Description
01/06/2004 11:45:30		Opt Out of Everything	Everything

## CMG Opt Out and Offers Maintenance Page

Email: jay@gordonworks.com

☐ Telephone☒ Email

Query

Opt Out Level to Add: Opt Out of Everything

Add Opt Out

Opt Outs for and Offers Sent to Email: jay@gordonworks.com

Initial Opt Out	Last Opt Out	Opt Out Item Type	Opt Out Item Description
01/06/2004 11:45:10	03/22/2004 15:34:22	Opt Out of Everything	Everything

## CMG Opt Out and Offers Maintenance Page

Email: jonathan@gordonworks.com

☐ Telephone☒ Email

Query

Opt Out Level to Add: Opt Out of Everything

Add Opt Out

Opt Outs for and Offers Sent to Email: jonathan@gordonworks.com

Initial Opt Out	Last Opt Out	Opt Out Item Type	Opt Out Item Description
03/22/2004 15:37:34		Opt Out of Everything	Everything

## EXHIBIT D

X-Persona: <James S. Gordon>  
 Return-Path: <bounce-jim#rcw19190020.com@115492024.ygcevent.com>  
 Delivered-To: 8-jim@rcw19190020.com  
 Received: from localhost by omniinnovations.com  
     with SpamAssassin (2.63 2004-01-11);  
     Sat, 04 Jun 2005 22:02:38 -0600  
 From: "Final notice" <bounce-jim#rcw19190020.com@115492024.ygcevent.com>  
 To: jim@rcw19190020.com  
 Subject: \*\*\*\*\*SPAM\*\*\*\*\* Your new credit line has been approved  
 X-Spam-Flag: YES  
 X-Spam-Checker-Version: SpamAssassin 2.63 (2004-01-11) on omniinnovations.com  
 X-Spam-Level: \*\*\*\*\*  
 X-Spam-Status: Yes, hits=6.3 required=3.0 tests=BANKRUPTCY,CLICK\_BELOW,  
     DATE\_MISSING,EXCUSE\_14,HTML\_40\_50,HTML\_FONTCOLOR\_UNKNOWN,  
     HTML\_FONT\_BIG,HTML\_LINK\_CLICK\_HERE,HTML\_MESSAGE,MIME\_HTML\_ONLY,  
     OFFERS\_ETC,RECEIVE\_OFFER,SELECTED\_YOU autolearn=no version=2.63  
 MIME-Version: 1.0  
 Content-Type: text/plain; charset=windows-1252; format=flowed  
 Date: Fri, 17 Jun 2005 06:29:30  
 Content-transfer-encoding: 8bit

Spam detection software, running on the system "omniinnovations.com", has identified this incoming email as possible spam. The original message has been attached to this so you can view it (if it isn't spam) or block similar future email. If you have any questions, see the administrator of that system for details.

Content preview: Get a \$7500 Platinum Credit Line regardless of credit history You have been selected to receive a \$7500 Platinum Shopping Card from USA Platinum Plus. You're approval is \*guaranteed, no matter your past credit ratings or history. Even past bankruptcy is OK. [...]

Content analysis details: (6.3 points, 3.0 required)

pts	rule name	description
1.0	DATE_MISSING	Missing Date: header
0.9	BANKRUPTCY	BODY: Avoid Bankruptcy
1.1	RECEIVE_OFFER	BODY: Receive a special offer
2.1	SELECTED_YOU	BODY: They have selected you for something
0.2	OFFERS_ETC	BODY: Stop the offers, coupons, discounts etc!
0.2	EXCUSE_14	BODY: Tells you how to stop further spam
0.5	HTML_40_50	BODY: Message is 40% to 50% HTML
0.1	HTML_FONTCOLOR_UNKNOWN	BODY: HTML font color is unknown to us
0.1	HTML_LINK_CLICK_HERE	BODY: HTML link text says "click here"
0.0	HTML_MESSAGE	BODY: HTML included in message
0.1	HTML_FONT_BIG	BODY: HTML has a big font
0.1	MIME_HTML_ONLY	BODY: Message only has text/html MIME parts
0.0	CLICK_BELOW	Asks you to click below

The original message was not completely plain text, and may be unsafe to

open with some email clients; in particular, it may contain a virus, or confirm that your address can receive spam. If you wish to view it, it may be safer to save it to a file and open it with an editor.

Received: (qmail 2179 invoked from network); 4 Jun 2005 22:02:36 -0600

Received: from mta01.ygcevent.com (64.62.249.72)

by greatnorthwest-alpha.org with SMTP; 4 Jun 2005 22:02:36 -0600

Received: by mta01.ygcevent.com (PowerMTA(TM) v2.0r13) id hk9slo04r2gg; Sat, 4 Jun 2005 20:30:20 -0700 (envelope-from <bounce-jim#rcw19190020.com@115492024.ygcevent.com>)

To: jim@rcw19190020.com

From: "Final notice" <bounce-jim#rcw19190020.com@115492024.ygcevent.com>

Subject: Your new credit line has been approved

Content-Transfer-Encoding: binary

Content-Type: text/html; charset="iso-8859-1"

MIME-Version: 1.0



SPAM Your new credit .htm

X-Persona: <Celia>  
Return-Path: <bounce-celia#celiajay.com@116683814.ygcevent.com>  
Delivered-To: 11-celia@celiajay.com  
Received: (gmail 19362 invoked from network); 18 Jun 2005 02:07:25 -0600  
Received: from mta01.ygcevent.com (64.62.249.72)  
by jaycelia.com with SMTP; 18 Jun 2005 02:07:25 -0600  
Received: by mta01.ygcevent.com (PowerMTA(TM) v2.0r13) id hmfb3q04r2gn; Sat, 18 Jun 2005 00:45:10 -0700 (envelope-from <bounce-celia#celiajay.com@116683814.ygcevent.com>)  
To: celia@celiajay.com  
From: "Final notice" <bounce-celia#celiajay.com@116683814.ygcevent.com>  
Subject: Your new credit line has been approved  
Content-Transfer-Encoding: 8bit  
Content-Type: text/html; charset=iso-8859-1  
MIME-Version: 1.0  
X-Spam-Checker-Version: SpamAssassin 2.63 (2004-01-11) on omniinnovations.com  
X-Spam-Level: \*\*\*\*\*  
X-Spam-Status: No, hits=6.3 required=7.0 tests=BANKRUPTCY,CLICK\_BELOW,DATE\_MISSING,EXCUSE\_14,HTML\_40\_50,HTML\_FONTCOLOR\_UNKNOWN,HTML\_FONT\_BIG,HTML\_LINK\_CLICK\_HERE,HTML\_MESSAGE,MIME\_HTML\_ONLY,OFFERS\_ETC,RECEIVE\_OFFER,SELECTED\_YOU autolearn=no version=2.63  
Date: Sun, 19 Jun 2005 10:24:28

## **Get a \$7500 Platinum Credit Line regardless of credit history**

**You have been selected to receive a \$7500  
Platinum Shopping Card from USA Platinum Plus.**

**You're approval is \*guaranteed, no matter your past credit ratings or history.  
Even past bankruptcy is OK.**

**And to help you get your \$7,500 Platinum Shopping Card  
sooner, there are no employment or credit verifications.**

### **Your Card is waiting Here**

(\*see website for terms and conditions)

To opt-out of this offer please [click here](#)

If you do not wish to receive special offers, discounts, and  
coupons from YourGiftCards.com, please do one of the following:

Use this link to unsubscribe

OR write us at Customer Service

PO Box 390520, Mountain View, CA 94039-0520

X-Persona: <Indi>

Received: (qmail 4306 invoked from network); 29 Mar 2005 23:31:57 -0000

Received: from unknown (HELO pre-smtp06-01.prod.mesa1.secureserver.net) ([64.202.166.30])  
(envelope-sender <bounce-indi#jammtomm.com@108142659.afgevent.com>)  
by smtp08-01.prod.mesa1.secureserver.net (qmail-lidap-1.03) with SMTP  
for <indi@jammtomm.com>; 29 Mar 2005 23:31:57 -0000

Received: (qmail 22658 invoked from network); 29 Mar 2005 23:31:57 -0000

Received: from unknown (HELO mta01.afgevent.com) ([64.62.249.68])  
(envelope-sender <bounce-indi#jammtomm.com@108142659.afgevent.com>)  
by pre-smtp06-01.prod.mesa1.secureserver.net (qmail-lidap-1.03) with SMTP  
for <indi@jammtomm.com>; 29 Mar 2005 23:31:57 -0000

Received: by mta01.afgevent.com (PowerMTA(TM) v2.0r13) id h97lmq04r2gc; Tue, 29 Mar 2005 15:31:56 -0800  
(envelope-from <bounce-indi#jammtomm.com@108142659.afgevent.com>)

To: indi@jammtomm.com

From: "Final notice" <bounce-indi#jammtomm.com@108142659.afgevent.com>

Subject: Your new credit line has been approved

Content-Transfer-Encoding: 8bit

Content-Type: text/html; charset=iso-8859-1

MIME-Version: 1.0

X-Nonspace: None

Date: Tue, 29 Mar 2005 16:27:44

## **Get a \$7500 Platinum Credit Line regardless of credit history**

You have been selected to receive a \$7500  
Platinum Shopping Card from USA Platinum Plus.

Your approval is \*guaranteed, no matter your past credit ratings or history. Even past  
bankruptcy is OK.

And to help you get your \$7,500 Platinum Shopping Card  
sooner, there are no employment or credit verifications.

Your Card is waiting Here

(\*see website for terms and conditions)

To opt-out of this offer please [click here](#)

If you do not wish to receive special offers, discounts, and  
coupons from Anyfreegift.com, please do one of the following:

Use this link to unsubscribe

OR write us at Customer Service

PO Box 390520, Mountain View, CA 94039-0520

EXHIBIT E



[celiajay.com](http://celiajay.com)



208.109.91.7



Jay Gordon  
200 Waldron Avenue  
Apt. #4  
Richland, Washington 99354  
United States



Gordon, Jay [jaygordon@charter.net](mailto:jaygordon@charter.net)  
200 Waldron Avenue  
Apt. #4  
Richland, Washington 99354  
United States  
(509) 943-8858 Fax --



Gordon, Jay [jaygordon@charter.net](mailto:jaygordon@charter.net)  
200 Waldron Avenue  
Apt. #4  
Richland, Washington 99354  
United States  
(509) 943-8858 Fax --



NS1.GORDONWORKS.COM



Created: 17-Jun-05  
Updated: 20-Jun-07  
Expires: 17-Jun-08  
Source: [whois.godaddy.com](http://whois.godaddy.com)



[chiefmusician.net](http://chiefmusician.net)



208.109.91.7



Bertrand Griffin II  
6607 Gehrig Dr.  
Pasco, Washington 99301  
United States



Griffin II, Bertrand [bertshawn@aol.com](mailto:bertshawn@aol.com)  
6607 Gehrig Dr.  
Pasco, Washington 99301  
United States  
(509) 545-1949 Fax --



Griffin II, Bertrand [bertshawn@aol.com](mailto:bertshawn@aol.com)  
6607 Gehrig Dr.  
Pasco, Washington 99301  
United States  
(509) 545-1949 Fax --



NS1.GORDONWORKS.COM  
NS2.GORDONWORKS.COM



Created: 13-May-05  
Updated: 17-May-07  
Expires: 13-May-09  
Source: whois.godaddy.com



[ehahome.com](http://ehahome.com)



208.109.91.7



Emily Abbey  
Apt. 608  
1407 2nd Ave. W  
Seattle, Washington 98119  
United States



Abbey, Emily [ehabbey@comcast.net](mailto:ehabbey@comcast.net)  
Apt. 608  
1407 2nd Ave. W  
Seattle, Washington 98119  
United States  
(206) 217-0466 Fax --



Abbey, Emily [ehabbey@comcast.net](mailto:ehabbey@comcast.net)  
Apt. 608  
1407 2nd Ave. W  
Seattle, Washington 98119  
United States  
(206) 217-0466 Fax --



NS1.GORDONWORKS.COM  
NS2.GORDONWORKS.COM



Created: 01-Feb-05  
Updated: 24-Jan-07  
Expires: 01-Feb-08  
Source: [whois.godaddy.com](http://whois.godaddy.com)



[ewaterdragon.com](http://ewaterdragon.com)



208.109.91.7



Darin Tillinghast  
18235 NW Sedgewick Court  
Beaverton, Oregon 97006  
United States



Tillinghast, Darin [pal@dancingwolf-inc.com](mailto:pal@dancingwolf-inc.com)  
PMB#125 8152 SW Hall Blvd  
Beaverton, Oregon 97008  
United States  
(503) 617-9008



Tillinghast, Darin [pal@dancingwolf-inc.com](mailto:pal@dancingwolf-inc.com)  
PMB#125 8152 SW Hall Blvd  
Beaverton, Oregon 97008  
United States  
(503) 617-9008



NS1.GORDONWORKS.COM  
NS2.GORDONWORKS.COM



Created: 15-Jul-06  
Updated: 15-Jul-07  
Expires: 15-Jul-08  
Source: whois.godaddy.com



[gordonworks.com](http://gordonworks.com)



208.109.91.140



Omni Innovations, LLC  
9804 Buckingham Drive  
Pasco, Washington 99301  
United States



Gordon, Jr., James S. [jim@gordonworks.com](mailto:jim@gordonworks.com)  
Omni Innovations, LLC  
9804 Buckingham Drive  
Pasco, Washington 99301  
United States  
5092101069 Fax --



Gordon, Jr., James S. [jim@gordonworks.com](mailto:jim@gordonworks.com)  
Omni Innovations, LLC  
9804 Buckingham Drive  
Pasco, Washington 99301  
United States  
5092101069 Fax --



NS1.GORDONWORKS.COM  
NS2.GORDONWORKS.COM



Created: 19-May-98  
Updated: 11-May-07  
Expires: 18-May-08  
Source: whois.godaddy.com



[itdidnotendright.com](http://itdidnotendright.com)



208.109.91.7



Omni Innovations, LLC  
9804 Buckingham Drive  
Pasco, Washington 99301  
United States



Glover-Gordon, Bonnie [bonniefaye@gordonworks.com](mailto:bonniefaye@gordonworks.com)  
Omni Innovations, LLC  
9804 Buckingham Drive  
Pasco, Washington 99301  
United States  
5092101069 Fax --



Glover-Gordon, Bonnie [bonniefaye@gordonworks.com](mailto:bonniefaye@gordonworks.com)  
Omni Innovations, LLC  
9804 Buckingham Drive  
Pasco, Washington 99301  
United States  
5092101069 Fax --



NS1.GORDONWORKS.COM  
NS2.GORDONWORKS.COM



Created: 05-Nov-04  
Updated: 27-Oct-06  
Expires: 05-Nov-07  
Source: [whois.godaddy.com](http://whois.godaddy.com)



[jammtonm.com](http://jammtonm.com)



208.109.91.7



Jamila Gordon  
4175 ZKurth St S  
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5095267180 Fax --



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NS1.GORDONWORKS.COM  
NS2.GORDONWORKS.COM



Created: 31-Jan-05  
Updated: 11-Feb-07  
Expires: 31-Jan-09  
Source: whois.godaddy.com



[jaycelia.com](http://jaycelia.com)



208.109.91.7



Jay Gordon  
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NS1.GORDONWORKS.COM



Created: 17-Jun-05  
Updated: 20-Jun-07  
Expires: 17-Jun-08  
Source: whois.godaddy.com



[jaykaysplace.com](http://jaykaysplace.com)



208.109.91.7



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NS1.GORDONWORKS.COM  
NS2.GORDONWORKS.COM



Created: 17-Jun-05  
Updated: 20-Jun-07  
Expires: 17-Jun-08  
Source: [whois.godaddy.com](http://whois.godaddy.com)

EXHIBIT F

**JAMES S. GORDON, JR.**  
**9804 Buckingham Drive**  
**Pasco, WA 99301**  
**509-210-1069**

TO: Jan Kirkwood, Williams Kastner & Gibbs, PLLC  
FROM: Jim Gordon  
SUBJECT: **PRESERVATION OF EVIDENCE for Case # 08-2-50143-7**  
DATE: February 13, 2008

Your client is required to preserve discoverable evidence related to the lawsuit entitled, Gordon et al versus Virtumundo filed in the Superior Court of Franklin County, Washington in February 7, 2008 [Case # 08-2-50143-7]. It is imperative that your client preserve all such documentary evidence, including discoverable electronic evidence.

The phrase "electronic evidence" refers to all non-privileged text files such as word processing documents, spreadsheets, electronic mail, all Internet history files and preferences, all graphical image files (*i.e.*, JPG., GIF., BMP. And TIFF. files), all databases, calendars and scheduling programs, all computer and network system activity reports and logs, all file fragments and backup tapes, and all data that exists on any of your client's computers. Electronic evidence may also include personally owned computers used by your client's employees.

A party's affirmative and proactive duty to safeguard documentary and tangible evidence, including electronic evidence, is well established. *See, e.g., LEXIS-NEXIS v. Beer*, 41 F.Supp.2d 950, 955 (9th Cir. 1999) (awarding monetary sanctions for destruction of electronic data); *Wm. T. Thompson Co. v. General Nutrition Corp.*, 593 F.Supp. 1443 (C.D. Cal. 1985) (imposition of monetary sanctions and striking of defendant chain store's answer and complaint were appropriate sanctions for abuse of discovery and destruction of evidence, including, electronic data, resulting in prejudice to plaintiff manufacturer).

Your client should issue instructions to directors, officers, employees, attorneys, agents and anyone else acting on behalf of or within the control of your client to immediately suspend destruction of documents, things and electronic evidence while this matter is pending, or until such items have been conclusively determined not to contain discoverable evidence.

Electronic evidence is extremely volatile and subject to spoliation. Therefore, to prevent the spoliation of electronic evidence, and to avoid a motion for sanctions arising out of such conduct, we suggest that your client issue immediate written instructions to his employees that direct them to:

- Immediately refrain from the practice of "recycling" backup tapes and storage media.

- Immediately refrain from any activity that would alter or damage data on any computer systems, including deleting, defragmenting, or compressing data, or disposing of any electronic media, including, but not limited, to backup tapes, hard drives, diskettes and CD-ROMs. Immediately refrain from saving new data to media that already contains data (thus overwriting current data). This would necessitate the use of new media (probably diskettes and CD-ROMs or other removable media) to save any newly-created information.
- Immediately refrain from installing new software or files on any media that already contains data.

Please note that the above list is not exhaustive and there are other measures that must be immediately implemented to protect discoverable electronic evidence depending on your client's computer and network configuration. Your client should thus consult immediately with his systems analysts to determine what additional steps should be implemented to meet his obligation to preserve discoverable electronic evidence.

Finally, be advised that the retrieval of electronic evidence can be extremely time-consuming, difficult, and expensive. We understand this and are prepared to work with your client to minimize costs. However, without regard to your client's initial burden to bear the cost of producing documents responsive to discovery requests, be advised that we will expect that your client will bear all additional discovery costs precipitated by your client's failure to preserve discoverable evidence in the manner such evidence existed at the time the duty to preserve evidence arose.

If at any point during the course of this dispute you learn that your client failed to take measures to preserve relevant and discoverable documents, including electronic evidence, or if you believe potentially relevant documents and electronic evidence have been destroyed or made irretrievable, please notify us at once in writing so we can work together to resolve the issue.

This effort to preserve electronic data extends to property that you have seized in the form of computers via the Writ of Execution of November 14, 2007 in the matter of Gordon v. Virtumundo , Case # 07-2-50898-1 filed in the Superior Court of Franklin County, Washington.

Regards,

Jim Gordon

## EXHIBIT G

SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF FRANKLIN

JAMES S. GORDON, JR., BONNIE F.  
GORDON, AND JONATHAN K.  
GORDON, individuals residing in Franklin  
County, Washington,

Plaintiff,

v.

VIRTUMUNDO, INC., ADKNOWLEDGE,  
INC., SCOTT LYNN, an individual, and  
John Does 1-10,

Defendants.

No. 08-2-50143-7

DEFENDANTS' OPPOSITION TO  
PLAINTIFF'S MOTION TO  
COMPEL DEFENDANTS'  
PRODUCTION OF EMAIL  
ARCHIVES OR IN THE  
ALTERNATIVE TO PRODUCE  
COPIES OF ALL HARD DRIVES  
FORMERLY OWNED BY  
PLAINTIFF

### I. Introduction

Defendants Virtumundo, Inc., Adknowledge, Inc., and Scott Lynn hold a judgment against Plaintiff James S. Gordon, Jr. for over \$100,000. Defendants executed on that judgment. In February 2008 the Franklin County Sheriff seized computers belonging to Gordon and sold them at a public auction. Defendant Virtumundo, Inc. was the highest bidder. Gordon moved this court for the return of the computers on the grounds that hard drives in the computers contained personal information. This Court denied that motion and instead ordered the destruction of the hard drives. Virtumundo complied with that order and the hard drives have been destroyed.

Additionally, Gordon's Motion is improper procedurally and wastes this Court's and Defendants valuable time and resources. Gordon has not served Defendants with interrogatories, requests for production, or any other discovery request to which a response could be compelled. Defendants respectfully request this Court sanction

1031s' OPP'N TO PL.'S MOT. TO COMPEL DEFS'  
PRODUCTION OF EMAIL ARCHIVES - 1

NEWMAN & NEWMAN,  
ATTORNEYS AT LAW, LLP

505 Fifth Ave. S., Ste. 610  
Seattle, Washington 98104  
(206) 274-2800

Case 2:08-cv-05074-LRS Document 77 Filed 10/02/09  
1 Gordon for opposing it.  
2

## 3 II. Facts

4 Defendants Virtumundo, Inc., Adknowledge, Inc., and Scott Lynn hold a judgment  
5 against Plaintiff James S. Gordon, Jr. for over \$100,000. See Gordon v. Virtumundo,  
6 Inc., 2007 U.S. Dist. LEXIS 55941 (W.D. Wash. Aug. 1, 2007). Defendants executed on  
7 that judgment. (Declaration of Derek Linke in Support of Defendants' Opposition to  
8 Plaintiffs' Motion to Compel ("Linke Decl.") at ¶ 2, Ex. A.) In February 2008, the  
9 Franklin County Sheriff seized computers belonging to Gordon and sold them at a public  
10 auction. (Id.) Defendant Virtumundo, Inc. was the highest bidder. (Id.)

11 Gordon moved this court for the return of the computers on the grounds that hard  
12 drives in the computers contained personal information. This Court denied that motion  
13 and ordered the destruction of the data on the hard drives. (See Linke Decl. ¶ 3, Exs. B,  
14 C.) Virtumundo complied with that order and the hard drives have been destroyed.  
15 (Linke Decl. at ¶ 4.)

## 16 III. Argument

### 17 A. There is Nothing to Be Compelled.

18 Rule 37(a)(2)<sup>1</sup> permits a party propounding discovery to seek a court order  
19 compelling another party's response to an outstanding discovery request:

20 If a deponent fails to answer a question propounded or submitted under  
21 rules 30 or 31, or a corporation or other entity fails to make a designation  
22 under rule 30(b)(6) or 31(a), or a party fails to answer an interrogatory  
23 submitted under rule 33, or if a party, in response to a request for inspection  
24 submitted under rule 34, fails to respond that inspection will be permitted  
25 as requested or fails to permit inspection as requested, any party may move  
26 for an order compelling an answer or a designation, or an order compelling  
27 inspection in accordance with the request.

28 No discovery has been served in this matter. Therefore, none of the Defendants have  
failed to answer or respond to any discovery and there are no answers or responses to

<sup>1</sup> Gordon's Motion does not include any authority supporting his requested relief. Defendants assume that references to "documentary and tangible evidence" (Motion at 1), "producing" (id. at 2), and "the requirement to confer prior to moving the court to intervene" (id.) collectively indicate Gordon seeks relief under Rule 37.

1 which this Court could compel a response. Furthermore, even if there had been discovery  
 2 requests, Virtumundo complied with this court's order by destroying the hard drives at  
 3 issue.

4 **B. Defendants are Entitled to Recover their Fees and Costs Incurred in**  
 5 **Opposing Gordon's Motion.**

6 Upon denying Gordon's improper Motion, this Court should award Defendants  
 7 their fees and costs incurred in opposing the Motion. Rule 37(a)(4) provides for an award  
 8 of sanctions against a party for bringing an unsuccessful motion to compel:

9 If the motion is denied, the court shall, after opportunity for hearing,  
 10 require the moving party [...] to pay to the party [...] who opposed the  
 11 motion the reasonable expenses incurred in opposing the motion, including  
 attorney fees, unless the court finds that the making of the motion was  
 substantially justified or that other circumstances make an award of  
 expenses unjust.

12 If this Court denies Gordon's Motion for the reasons in Section III.A, supra, it should  
 13 award Defendants their reasonable fees and costs. There is no substantial justification for  
 14 the Motion—Gordon has not served any discovery on Defendants in this matter, and he  
 15 was fully aware of this Court's order requiring the destruction of the hard drives. He  
 16 knew, or should have known, both that his Motion must fail and that the data he seeks has  
 17 been destroyed pursuant to court order.

18 **IV. Conclusion**

19 Gordon's Motion seeks the impossible: the data he requests has already been  
 20 destroyed in compliance with court order. Additionally, his Motion is procedurally  
 21 improper; there is no answer or response the Court could compel because Gordon has not  
 22 served Defendants with any discovery requests in this case. Defendants respectfully  
 23 request this Court deny Gordon's Motion and award them their reasonable fees and costs  
 24 in opposing it.

25 Respectfully Submitted,

26 **NEWMAN & NEWMAN**  
 27 **ATTORNEYS AT LAW, LLP**

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By: 

Derck A. Newman, WSBA No. 26967

Derek Linke, WSBA No. 38314

505 Fifth Avenue, Suite 610

Seattle, Washington 98104

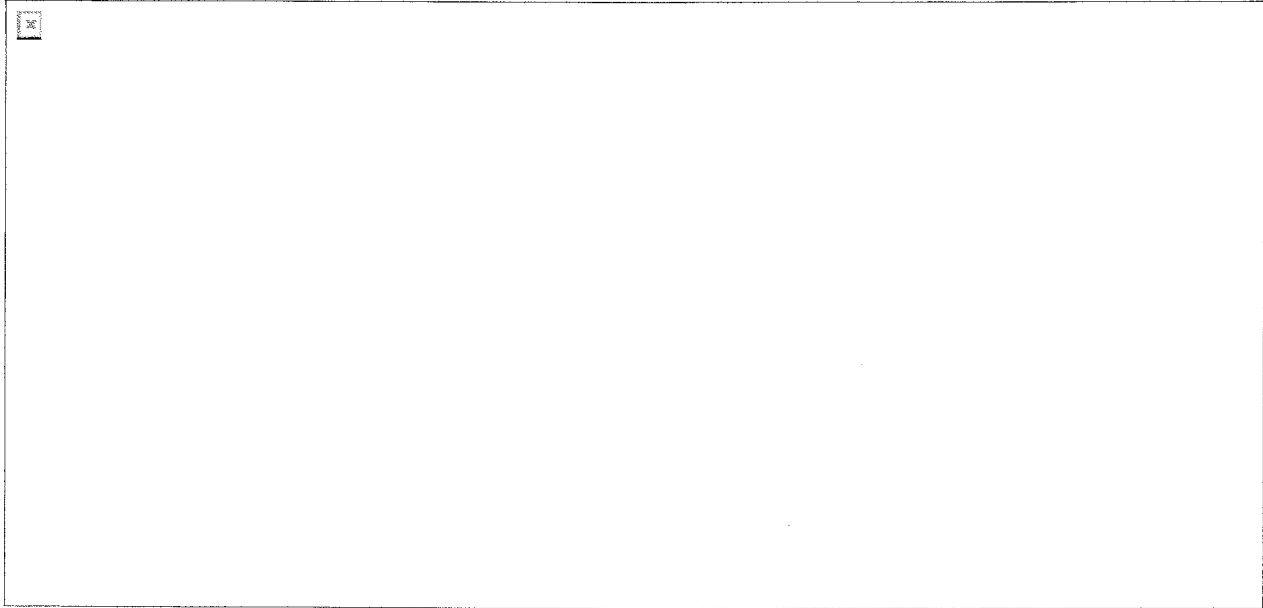
Telephone: 206-274-2800

Facsimile: 206-274-2801

## EXHIBIT H

From: Cross Roads Auto Loans <CrossRoadsAutoLoans@vm-mail.com>  
To: Friend <jim@itdidnotendright.com>  
Subject: Get approved in 30 seconds

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